

(8)  
No. 94-500

Supreme Court  
FILED  
FEB 6 1995  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,  
v. *Petitioner,*  
ERICH E. and HELEN B. SCHLEIER,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN SUPPORT OF RESPONDENTS**

DOUGLAS S. MCDOWELL  
ANN ELIZABETH REESMAN  
KIMBERLY L. JAPINGA \*  
MCGUINNESS & WILLIAMS  
1015 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600

*Attorneys for Amicus Curias  
Equal Employment Advisory  
Council*

\* Counsel of Record

## TABLE OF CONTENTS

|   | Page |
|---|------|
| TABLE OF AUTHORITIES .....  | ii   |
| INTEREST OF THE <i>AMICUS CURIAE</i> .....  | 1    |
| STATEMENT OF THE CASE .....   | 4    |
| SUMMARY OF ARGUMENT .....   | 5    |
| ARGUMENT .....  | 8    |
| I. AWARDS OF BACK PAY AND LIQUIDATED DAMAGES RECEIVED IN LITIGATION OR SETTLEMENT OF LITIGATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 ARE EXCLUDED FROM GROSS INCOME UNDER SECTION 104(A) (2) OF THE INTERNAL REVENUE CODE AS "DAMAGES RECEIVED ON ACCOUNT OF PERSONAL INJURIES OR SICKNESS" ..... | 8    |
| A. In Order For Damages To Be Excluded From Gross Income Under Section 104(a) (2) Of The Internal Revenue Code, The Cause Of Action Must Be Tort-like And The Damages Must Be Received "On Account Of Personal Injuries" .....  | 9    |
| B. Congress' Inclusion Of Jury Trials And "Liquidated Damages" In The ADEA Demonstrates Its Intent To Provide Relief For "Damages Received On Account Of Personal Injuries" .....   | 12   |
| C. The Nature Of The Cause Of Action And The Potential Relief Available Determines The Taxability, Not The Specific Award In A Given Case .....   | 16   |

## TABLE OF CONTENTS—Continued

|  | Page |
|--|------|
| II. TO FACILITATE SETTLEMENTS AND REDUCE THE BURDEN OF LITIGATION ON THE COURTS, DAMAGES AVAILABLE UNDER THE ADEA SHOULD BE EXCLUDED FROM GROSS INCOME ..... | 18   |
| CONCLUSION .....   | 22   |

## TABLE OF AUTHORITIES

| CASES  | Page       |
|--|------------|
| <i>Bennett v. United States</i> , 65 Fair Empl. Prac. Cas. (BNA) 1375 (1994) .....   | 15         |
| <i>Downey v. Commissioner</i> , 97 T.C. 150 (1991), and <i>aff'd</i> , 100 T.C. 634 (1993), <i>rev'd</i> , 33 F.3d 836 (7th Cir.), <i>petition for cert. filed</i> , 63 U.S.L.W. 3476 (U.S. Dec. 5, 1994) (No. 94-999) ..... | 5          |
| <i>Downey v. Commissioner</i> , 33 F.3d 836 (7th Cir.), <i>petition for cert. filed</i> , 63 U.S.L.W. 3476 (U.S. Dec. 5, 1994) (No. 94-999) .....  | 14         |
| <i>Maleszewski v. United States</i> , 827 F. Supp. 1553 (N.D. Fla. 1993) .....   | 14         |
| <i>McKennon v. Nashville Banner Publishing Co.</i> , No. 93-1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995) .....  | 16         |
| <i>Rice v. United States</i> , 834 F. Supp. 1241 (E.D. Cal. 1993) .....  | 14         |
| <i>Robinson v. Commissioner</i> , 102 T.C. 116 (1994) .....  | 19         |
| <i>Schmitz v. Commissioner</i> , 34 F.3d 790 (9th Cir.), <i>petition for cert. filed</i> , 63 U.S.L.W. 3462 (U.S. Nov. 23, 1994) (No. 94-944) .....  | 14-15      |
| <i>Trans World Airlines, Inc. v. Thurston</i> , 469 U.S. 111 (1985) .....  | 14         |
| <i>United States v. Burke</i> , 112 S. Ct. 1867 (1992) .....   | 3, 5, 9-12 |
| STATUTES AND REGULATIONS   |            |
| Age Discrimination in Employment Act,  |            |
| 29 U.S.C. § 621 <i>et seq.</i> .....   | 2, 8       |
| 29 U.S.C. § 623(a) (1) .....   | 8          |
| 29 U.S.C. § 626(f) .....   | 20         |
| Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991) .....   | 10         |
| Internal Revenue Code, 26 U.S.C. § 104(a) (2) .....  | 4-6, 8-9   |
| Treas. Reg. 29 C.F.R. § 1.104-1(c) .....   | 8          |
| LEGISLATIVE  |            |
| 124 Cong. Rec. H2272 (daily ed. March 21, 1978) ..   | 12         |
| 124 Cong. Rec. S4449 (daily ed. March 23, 1978) ..   | 14         |

## TABLE OF AUTHORITIES—Continued

|  | Page      |
|--|-----------|
| H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 14<br>(1978) ..... | 6, 12-13  |
| <br>MISCELLANEOUS  |           |
| Rev. Rul. 93-88, 1993-41 I.R.B. 4 .....                          | 6, 16, 18 |

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1994

\_\_\_\_\_  
No. 94-500  
\_\_\_\_\_

COMMISSIONER OF INTERNAL REVENUE,  
v. *Petitioner,*  
ERICH E. and HELEN B. SCHLEIER,  
\_\_\_\_\_  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

\_\_\_\_\_  
**BRIEF AMICUS CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
IN SUPPORT OF RESPONDENTS**  
\_\_\_\_\_

The Equal Employment Advisory Council (EEAC") respectfully submits this brief *amicus curiae*. The written consent of all parties has been filed with the Clerk of this Court. This brief argues for affirmance of the decision of the court below and thus supports the position of the respondents.

**INTEREST OF THE AMICUS CURIAE**

The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations, as



well as several associations which themselves have hundreds of EEAC's corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in 1976, filed over 350 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in numerous cases before this Court involving the proper interpretation of the Age Discrimination in Employment Act of 1967 (ADEA).<sup>1</sup>

All of EEAC's members are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to ADEA charges and other employment-

<sup>1</sup> *E.g.*, *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (standard of proof for recovery of liquidated damages); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (arbitrability); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (effect of state agency "no cause" finding); *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989) (application to employee benefits); *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (class actions); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (standard for liquidated damages).

related claims, EEAC's members are interested in whether damage awards under the ADEA are taxable. Indeed, EEAC filed a brief *amicus curiae* in *United States v. Burke*, 112 S. Ct. 1867 (1992), which raised the same issue under Title VII of the Civil Rights Act of 1964.

Thus, the issue presented is extremely important to the nationwide constituencies that EEAC represents. Mr. Schleier claimed that his employer, United Air Lines, Inc., discharged him because of his age in violation of the ADEA. The case was settled, and half of the award was attributed to back pay and the other half was attributed to liquidated damages. Mr. Schleier did not pay taxes on the liquidated damages portion of his award. When the government issued a statutory notice of deficiency for failure to pay taxes on the liquidated damages, Mr. Schleier brought an action in the United States Tax Court arguing that the entire award should be excluded from his gross income because the award was on account of personal injury. Pet. App. 64a.<sup>2</sup> The United States Tax Court concluded that the entire settlement under the ADEA was excludable from Mr. Schleier's income because it was awarded on the basis of a personal injury. The United States Court of Appeals for the Fifth Circuit appropriately affirmed the tax court's opinion, holding that "[m]oney recovered under the ADEA is excludable from income for the purposes of taxation." Pet. App. 69a.<sup>3</sup> ADEA

<sup>2</sup> Citations to the Appendix to the Petition for a Writ of Certiorari are designated as Pet. App. —.

<sup>3</sup> The unpublished opinion of the Court of Appeals for the Fifth Circuit below, No. 93-5555 (5th Cir. June 1, 1994), is reproduced at Pet. App. 68a-69a.

damages are awarded on account of a personal injury and therefore should be excluded from gross income.

Thus, the EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of EEAC's significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

#### STATEMENT OF THE CASE

Respondent Erich E. Schleier was a former United Air Lines, Inc. employee. United Air Lines had a policy that required individuals to retire at the age of sixty. Mr. Schleier filed suit in district court, alleging that his termination violated the Age Discrimination in Employment Act of 1967 (ADEA). The complaint was consolidated within a class action suit against United Air Lines, Inc. On June 30, 1986, the class action was settled. One half of the class members' settlement was attributed to back pay and the other half to liquidated damages. Pet. 3.<sup>4</sup>

Mr. Schleier paid tax on the back pay portion of his award as income, but did not pay tax on the liquidated damages portion of the settlement. The Commissioner of Internal Revenue issued a notice of deficiency, asserting that the liquidated damages were improperly excluded from his gross income. Pet. 3-4.

Mr. Schleier filed suit in the United States Tax Court alleging that the liquidated damages portion of the settlement was properly excluded from the gross income under Section 104(a)(2) of the Internal Rev-

<sup>4</sup> Citations to the Petition for a Writ of Certiorari are designated as Pet. —.

enue Code, which states that "gross income does not include the amount of any damages received . . . on account of personal injuries or sickness." 26 U.S.C. § 104(a)(2). He further argued that the back pay portion of his settlement also was excludable from gross income under Section 104(a)(2). Mr. Schleier filed a motion for summary judgment. On July 7, 1993, the Tax Court granted the motion, relying on its decision in *Downey v. Commissioner*, 97 T.C. 150 (1991), and *aff'd*, 100 T.C. 634 (1993), *rev'd*, 33 F.3d 836 (7th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3476 (U.S. Dec. 5, 1994) (No. 94-999). The United States Court of Appeals for the Fifth Circuit affirmed the Tax Court's decision, stating that "[m]oney received under the ADEA is excludable from income for the purposes of taxation." Pet. App. 68a. The Commissioner of Internal Revenue is appealing the Fifth Circuit's decision.

#### SUMMARY OF ARGUMENT

The decision of the court below to exclude lost earnings and liquidated damages recovered under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, from gross income pursuant to section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. § 104(a)(2), should be upheld. Section 104(a)(2) allows a damages award to be excluded from gross income if the statute creates a "tort-like" cause of action and compensates the individual for personal injury.

To determine whether a cause of action is "tort-like" and compensates an individual for personal injuries, this Court in *United States v. Burke*, 112 S. Ct. 1867, 1874 (1992), found that the availability of a jury trial and compensatory damages were con-



trolling. In amendments to the ADEA in 1978, Congress explicitly provided for a right to a jury trial and explained that liquidated damages provide "*full compensatory relief* for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages'." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 14 (1978) (emphasis added).

It is clear, then, that Congress intended to compensate an aggrieved individual for damages "on account of personal injuries" when it allowed for a jury trial and provided liquidated damages. Because the ADEA compensates an individual "on account of personal injuries," ADEA awards are properly excluded from gross income under 26 U.S.C. § 104(a) (2).

Further, the nature of the cause of action and the potential relief determines the taxability of an award, not the specific award in a given case. According to Revenue Ruling 93-88, for example, awards consisting solely of backpay are excludable from gross income under the Civil Rights Act of 1991, the Americans with Disabilities Act (ADA), and 42 U.S.C. § 1981. Rev. Rul. 93-88, 1993-41 I.R.B. 4. The same reasoning should apply to the ADEA because the cause of action and the available remedy are determinative—not the actual award in a particular case.

Important public policy reasons also support excluding ADEA damages from gross income. If ADEA damages are not excluded from gross income, parties in an ADEA case face a number of unpalatable choices, regardless of whether they settle the dispute or take it to court. When an employee settles a claim under several statutes, including the Civil Rights Act of 1991, the ADA, 42 U.S.C. § 1981, and the ADEA, a decision must be made whether to: 1) apportion

the award among the various statutes and pay taxes on the ADEA portion, but face the uncertainty of whether the apportionment will hold up under IRS scrutiny; or 2) declare the entire award as exempt from gross income and risk being challenged by the IRS for failure to pay taxes on the ADEA award.

To avoid those problems, there will be a temptation on the part of the parties to allocate all the relief to Title VII, the ADA, or § 1981 claims in order to avoid tax liability. This will encourage the filing of lawsuits under non-ADEA statutes (*e.g.*, ADA, Title VII as amended by the Civil Rights Act of 1991, and 42 U.S.C. § 1981) in order to take advantage of the tax status of a settlement or award under those statutes. This also will result in civil rights claims pled being at odds with an objective assessment of the strengths of the plaintiff's actual causes of action.

Further, differential tax treatment of various causes of action would put the IRS in the business of evaluating the strength and weaknesses of the causes of action when overseeing the parties' allocation of damages. The IRS does not have the expertise to make such judgments and should not be put in the position of second-guessing the parties' own evaluation of the value of the various claims.

Finally, one of the purposes of a settlement is to resolve such claims amicably so that the parties do not have to continue to disagree over those issues. Different tax treatment to various claims has the potential to frustrate settlements and risk reopening the merits of settled cases in order to deal with IRS tax deficiency claims.

## ARGUMENT

### I. AWARDS OF BACK PAY AND LIQUIDATED DAMAGES RECEIVED IN LITIGATION OR SETTLEMENT OF LITIGATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 ARE EXCLUDED FROM GROSS INCOME UNDER SECTION 104(A)(2) OF THE INTERNAL REVENUE CODE AS "DAMAGES RECEIVED ON ACCOUNT OF PERSONAL INJURIES OR SICKNESS"

Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. § 104(a)(2), excludes "[d]amages received . . . on account of personal injuries or sickness" from gross income.<sup>5</sup> Treasury regulations interpreting Section 104(a)(2) state,

The term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon *tort or tort type rights* or through settlement agreement entered into in lieu of such prosecution.

29 C.F.R. § 1.104-1(c) (emphasis added).

The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623 (a)(1).

<sup>5</sup> Section 104(a)(2) provides in relevant part, [g]ross income does not include—

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal injuries or sickness. . . .

### A. In Order For Damages To Be Excluded From Gross Income Under Section 104(a)(2) Of The Internal Revenue Code, The Cause Of Action Must Be Tort-like And The Damages Must Be Received "On Account Of Personal Injuries"

In order for a damages award pursuant to a lawsuit or settlement of a lawsuit to be excluded from gross income under Section 104(a)(2) of the Internal Revenue Code, the statute must be "tort-like" and compensate the individual for personal injury.

The essential element of an exclusion under section 104(a)(2) is that the income involved must derive from some sort of tort claim against the payor. . . . As a result, common law tort law concepts are helpful in deciding whether a taxpayer is being compensated for a "personal injury."

*United States v. Burke*, 112 S. Ct. 1867, 1870 (1992) (quoting *Threlkeld v. Commissioner*, 87 T.C. 1294, 1305 (1986) (internal quotation omitted), *aff'd*, 848 F.2d 81 (6th Cir. 1988)).

To determine whether a cause of action is "tort-like," "[r]emedial principles . . . figure prominently in the definition and conceptualization of torts." *Id.* at 1871. "[O]ne of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" *Id.* (quoting *Carey v. Piphus*, 435 U.S. 247, 257 (1978)). These damages may include compensation for emotional distress, pain and suffering, or in the case of a

[d]ignitary or nonphysical tort such as defamation. . . not only for any actual pecuniary loss (*e.g.*, loss of business or customers), but for "impairment of reputation and standing in the com-



munity, personal humiliation, and mental anguish and suffering.”

*Id.* at 1871-72 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). Thus, a statute’s remedial structure must be consistent with traditional tort liability and must compensate an individual for the personal injuries he or she has suffered.

In *Burke*, this Court held that prior to the 1991 amendments,<sup>6</sup> Title VII of the Civil Rights Act of 1964 did not compensate an employee for personal injuries in a tort-type action within the meaning of section 104(a)(2). The Court held that a statute “whose sole remedial focus is the award of backwages” does not redress a tort-like personal injury. *Burke*, 112 S. Ct. at 1873. “[I]n contrast to the tort remedies for physical and nonphysical injuries . . . Title VII does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions and other equitable relief.” *Id.*

This Court in *Burke*, however, did not state that discrimination never constitutes a personal injury: “No doubt discrimination could constitute a ‘personal injury’ for purposes of § 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy.” *Id.*

As examples of discrimination claims evidencing a personal injury, this Court distinguished the pre-1991 Title VII from the Civil Rights Act of 1991, 42 U.S.C. § 1981, and the fair housing provisions of Title VIII

<sup>6</sup> Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991), codified as 42 U.S.C. § 1981a, added limited compensatory and punitive damages as Title VII remedies.

of the Civil Rights Act of 1968. The Civil Rights Act of 1991, 42 U.S.C. § 1981, and the fair housing provisions of Title VIII of the Civil Rights Act of 1968 all are tort-like and compensate an employee on the basis of a personal injury because the individual has a right to a jury trial and may recover compensatory damages.

Under the Civil Rights Act of 1991, victims of intentional discrimination are entitled to a *jury trial*, at which they *may recover compensatory damages* for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,” as well as punitive damages. . . . [W]e believe that Congress’ decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII. . . .

*Id.* at 1784 n.12 (emphasis added) (citation omitted).

42 U.S.C. § 1981 permits victims of race-based employment discrimination to obtain a jury trial at which “both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded.”

*Id.* at 1873-74 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975)).

The Court similarly has observed that Title VIII of the Civil Rights Act of 1968, whose fair housing provisions allow for jury trials and for awards of compensatory and punitive damages, “sounds basically in tort” and “contrasts sharply” with the relief available under Title VII.

*Id.* at 1874 (quoting *Curtis v. Loether*, 415 U.S. at 195, 197; and citing 42 U.S.C. § 3613(c)).

**B. Congress' Inclusion Of Jury Trials And "Liquidated Damages" In The ADEA Demonstrates Its Intent To Provide Relief For "Damages Received On Account Of Personal Injuries"**

As this Court stated in *Burke*, a statute that provides for a jury trial and compensatory damages is awarding relief for "damages received on account of personal injuries or sickness." *Burke*, 112 S. Ct. at 1873-74 n.12. In the Age Discrimination in Employment Act Amendments of 1978, Congress gave the plaintiff a right to a jury trial<sup>7</sup> and explained that liquidated damages provide compensatory relief for damages that are too difficult to measure other than by liquidated damages. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 14 (1978).

Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of

<sup>7</sup> Prior to the 1978 amendments, jury trials were not provided for in the ADEA. In the 1978 amendments, however, Congress was explicit in its intention to provide for a right to a jury trial:

[S]enate amendment made explicit provision for a trial by jury in actions for monetary relief under the act. Subsequent to passage of the Senate amendment the Supreme Court in *Lorillard* against *Pons* held that the act as originally enacted did afford a right to trial by jury for claims for recovery of wages under the act. However, the court expressed no view on whether the act implicitly authorized a jury trial for claims for liquidated damages under the act. In adopting a revision of the Senate amendment, the conferees make clear that a jury trial is available for deciding those factual issues underlying claims for amounts owing as a result of a violation of the act. Liquidated damages are explicitly authorized as an amount owing under section 7(b) of the act.

124 Cong. Rec. H2272 (daily ed. March 21, 1978) (statement of Rep. Quie).

the FLSA [Fair Labor Standards Act], "amount owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for *nonpecuniary losses* arising out of willful violation of the ADEA.

*Id.* at 13-14 (emphasis added).

Further, Congress intended nonpecuniary losses to encompass more than just lost earnings:

The conferees . . . agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages."

*Id.* at 14 (quoting *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942)). This point was underscored during the Senate debate on the Age Discrimination in Employment Act Amendments of 1978 Conference Report:

The conference agreement provides that a party will be entitled to a jury trial on any issue of fact in an action by an individual for recovery of amounts owing to include items of pecuniary loss, such as wages and fringe benefits and other employee benefits as well as readily ascertainable consequential losses, such as moving expenses, which directly result from the violation. *In addition, juries are authorized to award liquidated*



*damages to compensate victims of discrimination for those losses which are too difficult of proof for estimate.*

124 Cong. Rec. S4449 (daily ed. March 23, 1978) (statement of Sen. Williams) (emphasis added).

Thus, Congress intended to compensate an aggrieved individual for damages "on account of personal injuries" when it allowed for a jury trial and provided liquidated damages.<sup>8</sup> Moreover, several circuit courts have found that the availability of a jury trial and the compensatory nature of the liquidated damages section makes the ADEA a tort-like statute, thereby rendering the damages excludable from gross income.<sup>9</sup>

In *Schmitz v. Commissioner*, 34 F.3d 790 (1994), petition for cert. filed, 63 U.S.L.W. 3462 (U.S. Nov.

<sup>8</sup> The government contends that this Court held in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613 (1985), that the legislative history of the ADEA states that Congress intended for liquidated damages to be punitive in nature. This simply is not the case because 1) the discussion regarding liquidated damages in *Thurston* is dicta, and 2) as the court in *Rice v. United States*, 834 F. Supp. 1241, 1245 n.3 (E.D. Cal. 1993), pointed out,

[T]hurston did not hold that the sole function of liquidated damages was punitive. And while the Court relied on Senator Javits' floor statement during the 1967 debate over the initial Act, the legislative history surrounding the 1978 Amendments shows that Congress intended liquidated damages to "compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA. . . ."

<sup>9</sup> But see *Downey v. Commissioner*, 33 F.3d 836 (7th Cir.), petition for cert. filed, 63 U.S.L.W. 3476 (U.S. Dec. 5, 1994) (No. 94-999); *Maleszewski v. United States*, 827 F. Supp. 1553 (N.D. Fla. 1993).

23, 1994) (No. 94-944), the Ninth Circuit held that liquidated damages "[c]ompensate the taxpayer for intangible losses." *Id.* at 796. As to the nature of liquidated damages, the court stated,

[e]xactly what injuries ADEA liquidated redress will inevitably vary from case to case; none of the cases the concurrence cites involve plaintiffs who were compensated for all of the damages mentioned. ADEA liquidated damages might compensate some plaintiffs for the emotional distress and future psychic injuries they may suffer upon return to work, for lost future wages which they cannot mitigate, for lost reputation, for their families' emotional distress and suffering, for the psychic toll of suing one's employer or any number of other injuries. . . . Because each employee's injuries differ—in ways that cannot be calculated—we need not devise a consistent explanation of the precise injuries ADEA liquidated damages redress. Rather, we believe that Congress's use of the term *liquidated* is dispositive.

*Id.* at 796 n.8. Thus, the court concluded that liquidated damages awarded under the ADEA should be excluded: "[A]DEA liquidated damages are, from the taxpayer's perspective, damages received on account of personal injury. They are therefore excludable under § 104(a)(2)." *Id.* See also *Schleier v. Commissioner*, No. 93-5555 (5th Cir. 1994) (holding that "[m]oney recovered under the ADEA is excludable from income for the purposes of taxation") and *Bennett v. United States*, 65 Fair Empl. Prac. Cas. (BNA) 1375, 1377 (1994) ("This court finds that ADEA redresses a tort-like personal injury because it provides a remedial structure consistent with traditional tort liability").



**C. The Nature Of The Cause Of Action And The Potential Relief Available Determines The Taxability, Not The Specific Award In A Given Case**

A recent Internal Revenue Ruling, Rev. Rul. 93-88, 1993-41 I.R.B. 4, holds that compensatory damages, including back pay, awarded under the Civil Rights Act of 1991, the Americans with Disabilities Act, and 42 U.S.C. § 1981, are excludable from gross income because the damages under each statute are awarded on account of a personal injury. As this Court recently noted in *McKennon v. Nashville Banner Publishing Co.*, No. 93-1543, 1995 U.S. LEXIS 699, at \*9-13 (Jan. 23, 1995) (emphasis added), the ADEA incorporates some of the same antidiscrimination and remedial provisions from Title VII and the Fair Labor Standards Act.

The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. . . . The ADEA incorporates some features of both Title VII and the Fair Labor Standards Act, which has led us to describe it as "something of a hybrid." *Lorillard v. Pons*, 434 U.S. 575, 578 (1978). The substantive, anti-discrimination provisions of the ADEA are modeled upon the prohibitions of Title VII (internal citations omitted). Its remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938. 29 U.S.C. § 626(b). When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees. 29 U.S.C. § 626(b); see also *Lorillard v. Pons*, *supra*, at 584. In the case of a willful violation of the Act, the ADEA authorizes an award of liquidated damages equal to the backpay award. 29 U.S.C. § 626(b). The Act

also gives federal courts the discretion to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]." *Ibid.*

*The ADEA, in keeping with these purposes, contains a vital element found in both Title VII and the Fair Labor Standards Act: it grants an injured employee a right of action to obtain the authorized relief. 29 U.S.C. § 626(c). The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA.*

Because the ADEA has a remedial scheme that awards damages on account of personal injury which is similar to Title VII, the ADA, and 42 U.S.C. § 1981, it follows that the Revenue Ruling is applicable to the ADEA.

The Revenue Ruling further specifies that damages are excludable from gross income even if the only award is back pay:

(1) Compensatory damages, including back pay, received in satisfaction of a claim of disparate treatment gender discrimination under Title VII of the Civil Rights Act of 1964, as amended in 1991, are excludable from gross income as damages for personal injury under section 104(a)(2) of the Code. *This is true even if compensatory damages in such a case are limited to back pay.*

. . . .

(2) Compensatory damages, including back pay, received in satisfaction of a claim of racial discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 are excludable from gross income as damages for personal injury under section 104(a)(2) of the Code.

This is true even if the compensatory damages in such a case are limited to back pay.

Similar results will apply to amounts received under the Americans with Disabilities Act, 42 U.S.C. § 12101-12213.

Rev. Rul. 93-88, 1993-41 I.R.B. 4 (emphasis added).

Again, this same analysis is applicable to the ADEA. If an aggrieved individual recovers only back pay, the award is still excluded from income because the cause of action and the potential remedy compensate an employee on account of a personal injury. The actual award in any individual case is not the determinative factor—rather, a court must look to the nature of the cause of action and the available remedy.

## II. TO FACILITATE SETTLEMENTS AND REDUCE THE BURDEN OF LITIGATION ON THE COURTS, DAMAGES AVAILABLE UNDER THE ADEA SHOULD BE EXCLUDED FROM GROSS INCOME

Important public policy considerations also support excluding ADEA damages from gross income. When an employee settles a claim under several statutes, including Title VII,<sup>10</sup> the Americans with Disabilities Act, and the ADEA, the parties must attempt to either: 1) apportion the award among the various statutes to determine the employee's and employer's tax obligations for purposes of the ADEA, but face the uncertainty of being sued by the Internal Revenue Service for failure to apportion the award appropriately; or 2) declare the entire award as exempt from income and risk being challenged by the Internal

<sup>10</sup> After the passage of the Civil Rights Act of 1991.

Revenue Service for failure to pay taxes on the ADEA award.

This situation hinders settlement because employers do not wish to be placed in the position of failing to withhold the appropriate taxes from a settlement. At the same time, employees do not wish to have funds withheld for taxes that would otherwise be theirs to keep. If the parties cannot surmount the hurdle of allocating the award, the case proceeds unnecessarily to trial.

If the parties do make an allocation, they still face uncertainty, as the *Robinson v. Commissioner*, 102 T.C. 116 (1994), demonstrates. In *Robinson*, a non-ADEA case, the plaintiffs prevailed against a bank in a suit based on breach of contract and tort claims for failure to release a lien on property. Although the plaintiffs had allocated 95 percent of the settlement to the tort claims (which would be excludable under § 104(a)(2)) when the Tax Court examined the tax treatment of the settlement, it found that the allocations were assessed solely to avoid federal tax liability, rather than reflecting the merits of the case. In addition, the court found that the allocations were "uncontested" and "nonadversarial." The tax court ultimately made its own allocations.

It follows that if ADEA damages are taxable, this same situation will occur any time an ADEA claim is paired with a Title VII, § 1981, or ADA claim—the parties will be forced to litigate the taxability of the award issue. This uncertainty, therefore, leads to more litigation, both from the IRS and the parties themselves.

Further, when several separate causes of action are alleged in a charge or complaint, it may be ex-



tremely difficult to make an allocation that will stand up under IRS scrutiny. For example, if the plaintiff is a 55-year old, disabled, black woman, there are at least four causes of action to which the settlement could be allocated: ADEA, ADA, Title VII and § 1981, not to mention state statutory and tort claims that may offer other remedies. Even if the parties undergo extensive discovery of the facts, it often will be impossible to unravel this "bundle" of rights in order to place a separate value upon each specific claim the plaintiff might have asserted in the charge or complaint.

Taxation of ADEA damages will create an economic incentive to allocate all the relief to Title VII, the ADA or § 1981 claims in order to avoid tax liability. Indeed, this situation will encourage the filing of lawsuits under these non-ADEA statutes in order to take advantage of the tax status of a settlement or award. Civil rights claims thus will proliferate and may be at odds with an objective assessment of the strength of various causes of action. Ironically, if the parties avoid ADEA claims in drafting their settlements, the plaintiff could lose the protections of the Older Worker Benefits Protection Act amendments to the ADEA, which are the only employment discrimination provisions that set up strict protections that must be included in all ADEA releases. *See* 29 U.S.C. § 626(f).

In addition, differential tax treatment of various causes of action would put the IRS and courts adjudicating tax disputes in the business of evaluating the strength and weaknesses of the causes of action when overseeing the parties' allocation of damages. The IRS does not have the expertise and the courts will not necessarily have the resources to make such

judgments and should not be put in the position of second-guessing the parties' own evaluation of the value of the various claims to which the settlement is allocated. Such judgments are inherently subjective and cannot be resolved without extensive discovery and examination of witnesses—the very types of inquiry that a settlement is designed to avoid.

Indeed, one of the purposes of a settlement is to resolve such claims amicably so that the parties do not have to continue to disagree over just such issues. Thus, not only would settlement be discouraged in many cases if various claims were given different tax status, but even settled cases would run the risk of being reopened on the merits in order to deal with IRS tax deficiency claims. As shown above, the ADEA's legislative history indicates that the statute was intended to remedy personal injuries. Thus, all these possible problems are easily avoidable by finding that ADEA damages are not taxable.

Finding that ADEA awards are not taxable will eradicate the uncertainty, relieve employers and employees from trying to appropriately allocate settlement funds, and facilitate the expeditious resolution of ADEA claims rather than furthering endless litigation.



CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decisions of the court below should be affirmed.

Respectfully submitted,

DOUGLAS S. McDOWELL  
ANN ELIZABETH REESMAN  
KIMBERLY L. JAPINGA \*  
MCGUINNESS & WILLIAMS  
1015 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600  
*Attorneys for Amicus Curiae*  
*Equal Employment Advisory*  
*Council*

\* Counsel of Record

February 1995